BEFORE THE PUBLIC DISCLOSURE COMMISSION
OF THE STATE OF WASHINGTON

IN THE MATTER OF ENFORCEMENT ACTION AGAINST JEFFERSON COUNTY REPUBLICAN CENTRAL COMMITTEE Respondent	PDC CASE NO. 04-288 HEARING MEMORANDUM OF RESPONDENT JEFFERSON COUNTY REPUBLICAN CENTRAL COMMITTEE

I. INTRODUCTION

The Jefferson County Republican Party challenged numerous misrepresentations made by a candidate for public office about his education, employment and business background in an advertisement commonly referred to as "Pinocchio Rose." The thrust of the advertisement, as admitted by the PDC's own investigator, was that Mark Rose was lying about his education, employment and business background. Mr. Rose was misrepresenting his credentials for public office. The question before the Commission is whether an error in detail about the nature of one of the candidate's misrepresentations supports a finding that the Jefferson County Party is guilty of sponsoring "false" political advertising in violation of RCW 42.17.530. Neither the facts nor the law support the staff's contentions.

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II. STATEMENT OF FACTS

On July 21, 2003, Mark Rose filed a candidate registration with the Public Disclosure Commission (Form C-1) declaring his candidacy for Jefferson County Commissioner in the 2003 general election. At the time of filing, Mark Rose was a complete unknown to virtually all of the voters in Jefferson County. In an attempt to persuade the voters that he was qualified to be County Commissioner, Mark Rose produced and had widely circulated to the voters a mailer or "Slim Jim". That Slim Jim stated that Mark Rose had been a "journalist with the New York Times and LA Times."

Also as part of his campaign, Mr. Rose made claim to formal education at New York University. The claim was false, and the local press reported on the falsehood. Mr. Rose claimed to be a successful businessman. The local press reported that he had been associated with a failed "dotcom" business and that his PDC filings showed no business assets.

In addition to the mailer, Mark Rose made numerous public speaking engagements and made himself available for interviews by the two local newspapers, The Port Townsend Leader and The Peninsula Daily News. The Leader's August 27th edition documented Rose's involvement with a failed dotcom business in California and Rose's admission that his current business in Jefferson County "has been inactive during the two months he has been campaigning and it is producing no income."

To inform voters about the untrue statements by Mark Rose the Jefferson County Republican Central Committee caused a television ad to be prepared in October 2003. The central point of this ad was that Mark Rose had been lying about his educational and employment experience. The ad pointed to three specific examples: Rose's lie about a New York University education; Rose's lie that he was a successful businessman, and Rose's lie that he had been a journalist with the Los Angeles Times and the New York Times.

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The television ad dubbed "Pinocchio Rose" ran on local stations in Jefferson County from October 16 through October 26, 2003, and from October 31 through November 3, 2003. Two of the three claims of lying made in the ad are not disputed as being true and accurate. The third claim, was that Mr. Rose was also lying about his employment with the LA Times. The Jefferson County Republican Party investigated Mr. Rose's claim to have been a journalist with LA Times before airing the ad. Bryn Armstrong, a Democrat, and former newspaperman contacted a former colleague who had extensive experience at the LA Times. Noel Greenwood was an editor at the LA Times during the 1982 period when Rose claimed to be a journalist for that paper. Mr. Greenwood had no recollection of Mark Rose and he checked with a number of other people who had been in the editorial department who also had absolutely no recollection of Mark Rose having been at the LA Times. He also had the librarian at the LA Times check the newspaper files and could find no reference to Mark Rose having been a journalist at the LA Times. The lack of records appeared to contradict materials the local press had received from Mr. Rose. Mr. Greenwood initially reported his findings orally and then confirmed it in a fax letter on October 17, 2003.

Sally Parker, investigator for PDC, admitted at her deposition that the main point or thrust of the "Pinocchio Rose" ad was that Mr. Rose was lying about his background. Subsequent investigations by the Public Disclosure Commission have confirmed that Mark Rose was employed for approximately 7-1/2 months from April 26, 2002 through December 6, 2002 as a "copy messenger" not a journalist by the LA Times.

In his sworn interview with the PDC, Rose stated that he had no particular title as an employee of the LA Times, but was called, among other things an "editorial writer." In fact, he did have a title with the paper. It was "copy messenger," not journalist and not "editorial writer."

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III. LEGAL ISSUES

1. Is it a violation of the false political advertising statute where the substance of the allegations in the advertising (the "sting" or "gist" of the ad), that the candidate has been lying about his background are true, but the detail of one of the specific charges is incorrect.

2. In the context of a pattern of falsehoods by a candidate, can the staff prove by clear and convincing evidence that it was reckless for the Jefferson County Republican Party's to rely on investigation by a disinterested person as to the truth of subject matter of its advertising, or that contrary reports in the press constitute "actual knowledge" that the advertising was false? Did the Public Disclosure Commission analyze the "Pinocchio" ad under the correct legal standard required in Washington to determine what the gist or "sting" of the advertisement was and whether the alleged inaccurate statement materially added to that "sting".

3. Is the Washington State statute under which Respondent is charged, RCW 42.17.530, unconstitutional, in violation of the First Amendment to the Constitution of the United States and Art. 1 sec. 5 of the Washington State Constitution?

IV. LEGAL AUTHORITIES AND ARGUMENT

A. The Sting" of the Advertising – that Mark Rose was lying – was true.

The Public Disclosure Commission in its administrative charge has assumed the materiality of the statement without any analysis of the appropriate review required. Washington State, as is true with most states, has a well-established body of law concerning alleged defamatory statements and whether such statements are material.

One of the seminal cases in Washington is *Mark v. Seattle Times*, 96 Wn.2d 473, 635 P.2d 1081 (1981). The court summarized the rule that a statement is not false, so long as the gist of the story is true:

> It is now generally agreed that a defamation defendant need not prove the literal proof of every claimed defamatory statement. W. Prosser, *Torts*, 798 (4th Ed. 1971). A defendant need only show that the statement is substantially true or that the gist of the story, the portion that carries the "sting", is true. W. Prosser, *supra*. . . . [Discussing cases from other jurisdictions]. *Id.* at 494.

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> The question is whether greater opprobrium attaches to the inaccuracy than would attach to an accurate statement. No significantly greater opprobrium attaches to a statement that a person "bilked the state out of at least $300,000 . . . to one that he was charged with larceny based on an audit sample revealing "over $200,000 in fraud billing." . . . The inaccuracy, if any, does not alter the "sting" of the publication as a whole and does not have a material effect on a viewer, listener, or reader than that which the literal truth would produce. *See OOR vs. Argus – Press Co.*, 586 F.2d 1108, 1112-13 (6th Cir. 1978). (Citations to Clerk's Papers omitted). *Id.* at 494.
>
> There must be a showing "that the inaccurate statements caused him any further damage than has resulted from the conviction and sentence on a grand larceny charge." The court concluded "the errors hereunder reviewed did not materially add to the damage suffered . . . by reason of the truthful publication of matters relating to the charge and conviction for grand larceny." *Id.* at 494.

The next major case in Washington following *Mark* was *Herron v. King Broadcasting*, 112 Wn.2d 762, 776 P.2d 98 (1989). That case involved a television report given by Don McGaffin concerning the Pierce County Prosecutor. The court in that case amplified the *Mark* holding. The "gist" or "sting" of the story must be determined as a whole.

> Where a report contains a mixture of true and false statements, a false statement (or statements) affects the "sting" of a report only when "significantly greater opprobrium" results from the report containing the falsehood than would result from the report without the falsehood." *Id.* at 768.

Here, the Jefferson County Republican Party correctly reported that Mark Rose was lying about his employment background, but did not have all the details right. The *Mark* court made clear these errors in details do not render a report false, so long as the basic point is true.

> In other words, it was the <u>theft</u> not the amount of the <u>theft</u> that constituted the story's sting. The damage to Mark came from being called a <u>thief</u>. Being called a major <u>thief</u> rather than a petty <u>thief</u> did not add a separate and distinct type of damage to the story. A <u>thief</u> is a <u>thief</u>. Therefore, the inflation of the amounts involved did not affect the "sting" of the story in *Mark*. (Emphasis supplied).

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This holding is exactly analogous to the facts in our case. The television ad asserts that Mark Rose is a liar and contains two undisputed lies as well as the statement at issue. Therefore, the "sting" or gist of the advertisement is that Mark Rose is a liar and that is supported by two undisputed lies. Mr. Rose also lied about his employment at the Los Angeles Times. The Times documents make clear that Rose was a messenger, not a journalist. The sting of the story – that Rose lied about his employment is not altered by an error in the detail of his lie. A lie is a lie.

The staff attempts to isolate a single detail out of the entire advertisement and ignores the remainder of the information in the ad and the overall gist of the ad. As made clear by the Washington Supreme Court, the staff may not isolate a single sentence in a total advertisement and claim that the sentence by itself constitutes a material misrepresentation.

The "sting" test continues to be the rule. *Mohr v. Grant*, 117 Wn.App. 75, 68 P.3d 1159 (2003). In that case, the court noted that summary judgment is the appropriate remedy for a defendant if the sting of the story is true:

> The defendant need not prove the literal truth of disputed statements when moving for summary judgment. *Mark*, 96 Wn.2d at 494. Rather the publisher "need only show that the statement is substantially true or that the gist of the story, the portion that carries the "sting" is true." *Ernest Home Center, Inc. v. United Food and Commercial Workers Int'l Union, Local 1001*, 77 Wn.App. 33, 43, 888 P.2d 1196 (1995) (quoting *Mark*, 96 Wn.2d at 494) . *Id.* at 83.

Applying that test to the "Pinocchio Rose" ad, it is clear that the "sting" or gist of that story is whether Mr. Rose was lying. At her deposition, the staff's investigator conceded that the "thrust" of the "Pinocchio Rose" ad was that Mr. Rose was lying about his background. The ad itself makes this clear. The large print featured throughout the 30-second ad states: "Is Mark Rose lying?" This overlay remains in place throughout each allegation of lying by Mark Rose.

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As to two of the three examples of lying in the 30-second ad, there is no dispute. Mark Rose's statements that he was educated at New York University, while in fact, having a high school education, is admittedly false. His claim to be a "successful businessman", is likewise untrue. The gist or "sting" of the third part advertisement is also true. The staff completely ignores this analysis in asserting violations by the respondent Jefferson County Republican Central Committee in the "Pinocchio Rose" ad The staff acknowledges that Rose claimed to be a journalist with the New York Times and Los Angeles Times. This claim was made repeatedly by Mark Rose throughout the campaign and was included in his "Slim Jim" mailer. It was this untrue claim that prompted Bryn Armstrong to contact his old friend from the Times. It was Rose's claim to have been a journalist that prompted Noel Greenwood to investigate Rose's credentials. The truth is that Mark Rose was never a journalist with either the New York Times or the Los Angeles Times. He had no job with the New York Times and with regard to the Los Angeles Times, was employed for a 7-1/2 month period in 1982, some twenty-one years prior, as a "copy messenger", not as a journalist. The statements made by Mark Rose in his "Slim Jim" campaign mailer and throughout the campaign, are also false. As Mr. Noel Greenwood, who was the Editor of the Los Angeles Times in 1982, stated, if a person is a copy messenger, he is not entitled to refer to himself as a journalist, which was the essence of Mr. Rose's claim. Mr. Rose would never have included in his resume of significant accomplishments addressed to the Jefferson County voters, that he was a "copy messenger". That employment position would not have resulted in any cachet or belief that Mr. Rose had the credentials to be elected as a County Commissioner, the highest elective position in Jefferson County. By utilizing the term "journalist" Mr. Rose was attempting to convey the clear impression to the voters that he was of the same stature as a Bob Woodward or Carl Bernstein of "Deep Throat"

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fame from elite papers, the Los Angeles Times and the New York Times. The essence of the lie by Mr. Rose was not that he was employed at the Los Angeles Times, but that he was a journalist at the Los Angeles Times.

When the whole ad is analyzed, as required under Washington law, it is clear that the Public Disclosure Commission staff has completely failed to prove by any standard, much less clear and convincing evidence that the respondent has published a "false statement of material fact" about a candidate for public office as required under RCW 42.17.530.

B. The Jefferson County Republican Party relied upon investigation by a disinterested person. It was not reckless to rely on the word of a disinterested person as opposed to information provided by the candidate to local papers, particularly in light of the candidate's pattern of misrepresentation of his credentials.

In addition to the above, staff has also completely failed to prove by clear and convincing evidence that the respondent acted with "actual malice". As stated, the essence of Mr. Rose's claim was that he was a journalist with the Los Angeles Times. In order to test the truthfulness of this assertion, the respondent through Bryn Armstrong, a Democrat and husband of the County Vice-Chairman, inquired of Mr. Noel Greenwood, a former editor at the Los Angeles Times, whether Mr. Rose had been a journalist at that paper. Mr. Greenwood not only did not recall any Mark Rose employment as a journalist at the Los Angeles Times, but checked with others who had been at the paper at that time, and none of them recalled Mr. Rose either. Research by the LA Times librarian also failed to substantiate Mr. Rose's claim to be a "journalist." The librarian found no clips in the paper's library. Given the time constraints of the campaign, this was a reasonable inquiry by respondent as to the assertion by Mr. Rose that he had been a journalist at the Los Angeles Times. The Public Disclosure Commission staff asserts in its complaint that it was the duty of the

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Republican Committee to also check with the employment department at the Los Angeles Times directly as a part of their duty of inquiry. This disregards the context of the campaign or the pattern of falsehoods and misrepresentations by Rose of other key points of his background. The staff inquiry done by Sally Parker, the investigator for the Public Disclosure Commission, confirmed that Mr. Rose was never employed as a journalist by the Los Angeles Times, but rather was employed as a "copy messenger" for 7-1/2 months during 1982. The inquiry by Jefferson County Republican Central Committee, was reasonable, checking not only people that were employed in the editorial department at the paper at the time, but through Mr. Greenwood, the library of published articles at the Los Angeles Times. A check of the actual employment records would have confirmed that Mr. Rose was not employed as a journalist at the Los Angeles Times, and that Rose had lied about his background. The Public Disclosure Commission cannot meet its burden of proof by clear and convincing evidence, that the Jefferson County Republican Central Committee acted with "actual malice" that is, with knowledge of the falsity or reckless disregard as to the truth or falsity of its allegation that Mr. Rose was lying when he said he was a journalist with the New York and Los Angeles Times.

The *Herron* case discusses malice or reckless disregard for the truth.

> . . . Evidence of either deliberate falsification or reckless publication "despite the publisher's awareness of probable falsity" was essential to recovery by public officials in defamation actions. These cases are clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. (Emphasis supplied).

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112 Wn.2d at 775, quoting *St. Amant v. Thompson*, 390 U.S. 727, 730-31, 20 L.Ed.2d 262, 88 S.Ct. 1323 (1968). Malice or recklessness is not proved by inaccuracy.

> Failure to investigate is not sufficient to prove recklessness. *Sullivan*, at 287; *St. Amant* at 733. Nor do mistakes made in the course of investigating a news story necessarily constitute recklessness. *Time, Inc. v. Pape*, 401 U.S. 279, 28 L.Ed.2d 45, 91 S.Ct. 633 (1971).

The Jefferson County Republican Central Committee, in fact, did investigate the truth of the allegation by Mr. Rose that he was a journalist with the Los Angeles Times. They contacted Noel Greenwood, a former Editor with the Los Angeles Times during the period in question. In addition to reporting that he had no recollection of a Mark Rose being a journalist at the Los Angeles Times, Mr. Greenwood also checked with other editors who confirmed his lack of recollection. He also checked the "library" of the Los Angeles Times, a history of their news stories, and found no reference to Mark Rose as a journalist with the Los Angeles Times. It is undisputed that respondent relied on Mr. Greenwood's oral report, confirmed by his letter concerning Mr. Rose's employment as a journalist with the Los Angeles Times. There is absolutely no evidence that the respondent had any actual knowledge that Mr. Rose was a journalist.

C. **RCW 42.17.530 is unconstitutional because it explicitly authorizes some persons to lie about a candidate, and serves no compelling state interest.**

The respondent is providing this section of the memorandum to preserve its rights of appeal on the issue of the constitutionality of the statute, in the event that the Commission determines that the PDC has met his heavy burden of clear, cogent and convincing evidence to support a finding that the advertisement as a whole was materially false and published with actual malice as defined in the statute. The respondent recognizes that this Commission cannot address the issue of the constitutionality of the underlying statute which forms the basis for the charges herein.

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As a final point, respondent asserts that RCW 42.17.530 is unconstitutional under the United States and Washington State Constitution as an infringement upon the free exercise of political speech. The statute serves no compelling state interest. It authorizes lies by some, but purports to punish others.

RCW 42.17.530 was reviewed by the Washington State Supreme Court, which ruled in June 1998 that the statute as then codified, was unconstitutional under the First Amendment of the Constitution. *State v. 119 Vote No! Committee*, 135 Wn.2d 618, 957 P.2d 691 (1998). Following that opinion, the Washington State Legislature amended the statute to its current form, which bars any person from sponsoring with actual malice "political advertising that contains a false statement of material fact about a candidate for public office." RCW 42.17.530(1)(a). The Legislature made express findings regarding the motivation behind the 1999 amendment:

> (1) The Washington supreme court in a case involving a ballot measure, *State v. 119 Vote No! Committee*, 135 Wn.2d 618 (1998), found the statute that prohibits persons from sponsoring, with actual malice, political advertising containing false statements of material fact to be invalid under the First Amendment to the United States Constitution.
>
> (2) The legislature finds that a review of the opinions indicates that a majority of the supreme court may find valid a statute that limited such a prohibition on sponsoring with actual malice false statements of material fact in a political campaign to statements about a candidate in an election for public office.
>
> (3) It is the intent of the legislature to amend the current law to provide protection for candidates for public office against false statements of material fact sponsored with actual malice.

Laws of 1999, ch. 304, § 1. The legislature's position was based on Justice Madsen's concurring opinion, which identified as an open question whether the state had a valid interest in protecting the reputations of individual candidates for office. *119 Vote No!*, 135 Wn.2d at 633, 957 P.2d at 699.

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Her concurring opinion acknowledged that there were no cases directly on point supporting its position. *Id.* at 635, 957 P.2d at 700. However, it is clear that the attempt by the Washington State Legislature to amend the statute cannot withstand a constitutional challenge.

The First Amendment to the United States Constitution, as interpreted by the Washington State Supreme Court in *Washington ex rel Public Disclosure Commission v. 119 Vote No! Committee*, 135 Wn.2d 618, 957 P.2d 691 (1998), prohibits the state from penalizing anyone for making political statements about another even if the statements turn out to be inaccurate. As the court stated "the First Amendment operates to ensure the public decides what is true and false with respect to governance." *119 Vote No! Committee*, 135 Wn.2d at 625, 957 P.2d at 695. The fatal flaw in RCW 42.17.530, even as amended, is that it places a government agency in the role of determining political truth, instead of leaving that judgment to the people. The chilling effect of this government intrusion into political speech is significant and harmful to the democratic process:

> Ultimately, the state's claimed compelling interest to shield the public from falsehoods during a political campaign is patronizing and paternalistic. It assumes the people of the state are too ignorant or disinterested to investigate, learn, and determine for themselves the truth or falsity in political debate, and it is the proper role of the government to fill the void. *119 Vote No!*, 135 Wn.2d at 632, 957 P.2d at 698-99 (citations omitted).

As the Court further pointed out, the state "cannot substitute its judgment as how best to speak for that of speakers and listeners; free and robust debate cannot thrive if conducted by the government." *119 Vote No!*, 135 Wn.2d at 626, 957 P.2d at 696 (citing *Riley v. National Federation of the Blind*, 487 U.S. 781, 791, 108 S.Ct. 2667, 2675, 101 L.Ed.2d 669, 686 (1988). As the court also noted, even false statements make "valuable contributions to debate by bringing about the clear perception and livelier impression of truth, produced by its collision with error." *119 Vote No!*, 135

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Wn.2d at 625 (citing *New York Times v. Sullivan*, 376 U.S. at 279, 84 S.Ct. at 726, 11 L.Ed. 2d at 706 n. 19).

The First Amendment looks unfavorably upon any government participation in the public debate because that participation inevitably results in government censorship. This concern is paramount when the government regulates political speech as "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-74, 85 S.Ct. 209, 214-15, 13 L.Ed.2d 125, 131-32 (1964). "The right of free public discussion of the stewardship of public officials was in Madison's view a fundamental principal of the American form of government." *New York Times v. Sullivan*, 376 U.S. at 275, 84 S.Ct. 723, 11 L.Ed.2d at 703. The United States Supreme Court previously articulated this mistrust of government as arbitrator of truth in the public arena, noting that "every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us." *Thomas v. Collins*, 323 U.S. 516, 545, 65 S.Ct. 315, 329, 89 L.Ed. 430, 448 (1945).

Further, the Washington State Supreme Court in *State v. 119 Vote No! Comm.*, specifically held that RCW 42.17.530(1)(a) is invalid because it does not serve a compelling state interest as required.

The Commission needs only to look at the effect of the amended statute to determine that it cannot and does not serve any compelling state interest. The statute allows unlimited lying by the candidate and the candidate's friends, with absolutely no regulation as to content of that candidate's assertions. On the other hand, anyone questioning the candidate's statements is subject to scrutiny under the statute as to the absolute truth of the claims made about the candidate. This places the state then in the position of always siding with a candidate and against his opponents. If the

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perceived evil is lies in a political campaign, then the statute should preclude lies by either the candidate or his or her opponent. The statute does not do that. Rather it impairs and chills an opponent from questioning claims or assertions of the candidate on the risk of being found in violation of RCW 42.17.530 and subjected to fines and sanctions. This is exactly the evil that places the statute in clear violation of the First Amendment of the United States Constitution.

> (Because) RCW 42.17.530(1)(a) infringes upon protected speech, the court must apply "exacting scrutiny." The state bears the "well-nigh insurmountable" burden to prove a compelling interest that is both narrowly tailored and necessary to achieve the state's asserted interest. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347, 115 S.Ct. 1511, 1519, 131 L.Ed.2d 426 (1995); *Burson,* 504 U.S. at 198. States rarely meet this heavy burden.

The second part of the test of constitutionality is that even if the state possesses a compelling state interest, it must also prove that the statute at issue is necessary to serve that interest. However, as the court in *State v. 119 Vote No! Comm'n* held at page 631, "the record here demonstrates RCW 42.17.530(1)(a) may be manipulated by candidates to impugn the electoral process rather than promote truthfulness." 135 Wn.2d at 631. Here the complaint filed by Rose's campaign manager impugns rather than vindicates truthfulness and the electoral process. The essence of the complaint is that although Mr. Rose lied, the Jefferson County Republic Central Committee should be called to account for publishing that first, and getting the details of one of the lies wrong.

In conclusion, the court held, which is still true, that RCW 42.17.530(1)(a) "forecloses political speech, usurps the rights of the electorate to determine the merits of political initiatives without fear of government sanction, and lacks a compelling state interest in justification." The court then went on to hold: "the First Amendment to the United States Constitution renders RCW 42.17.530(1)(a) facially unconstitutional." *State v. 119 Vote No!* at p. 632.

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The Washington State Constitution, Article 1, Section 5, has been consistently held to provide even greater protection than its federal counterpart. Thus, RCW 42.17.530 also violates the state constitution. *See, Ino-Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 937 P.2d 154 (1997) and *State v. Noah*, 103 Wn.App. 29, 9 P.3d 858 (2000). The Pinocchio Rose ad does not constitute an abuse of the right to speak or publish freely on all topics.

Respectfully submitted this 13 day of October, 2004.

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